UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	Filed June 22, 1982
Plaintiff-Appellee,	No. 81-1367
v.	D.C. No. CR 81-202-1-DWW
CLYDE MARION MELLIES,	MEMORANDUM
Defendant-Appellant.	

Appeal from the United States District Court for the Central District of California
David W. Williams, District Judge, Presiding
Argued and Submitted May 7, 1982

Before: BROWNING, Chief Judge, TANG and FARRIS, Circuit Judges

Defendant's due process rights were not violated by the Government's preindictment delay. Defendant's self-serving testimony and affidavits as to what alleged witnesses would have said at trial were too speculative to establish the actual prejudice that is prerequisite to such a claim. United States v. Mills, 641 F.2d 785, 789 (9th Cir. 1981).

Furthermore, the delay, nine months at most, was justified by an ongoing investigation of the larger distribution scheme and was not unreasonable. Unites States v. Lovasco, 431 U.S. 783, 792-93 (1977); Mills, supra, 641 F.2d at 789 n.2; United States v. Walker, 601 F.2d 1051, 1056 (9th Cir. 1979).

The district court did not abuse its discretion in denying defendant's motion for a mistrial. Defendant's motion was based on the ground that his right to effective cross-examination of witness Green was compromised as a result of a prior attorney-client relationship between defendant's attorney and Green. But the defendant did not raise the issue until the day after Green had completed her testimony, and offered no excuse for failing to voice a timely objection. Nor did defendant request that Green waive any attorney-client privilege, and thus obviate the problem. Cf. Tisnado v. United States,

547 F.2d 452, 460 (9th Cir. 1976).

The Government did not violate the Jencks Act, 18 U.S.C. § 3500 by failing to disclose Green's interview statement before Green testified. Nor did the statement contain exculpatory material disclosable under Brady v. Maryland, 373 U.S. 83 (1953). In any event, defendant was given an extra day to prepare and present surrebuttal evidence, and has not demonstrated that time was insufficient.

The Grand Jury indictment was not defective because the transcript of the Grand Jury proceeding failed to recite that a quorum was present when the main witnesses testified; in the absence of contrary evidence we must presume that grand jurors properly performed their duties. United States v. Barker, No. 80-1853, slip op. at 1781-82 (9th Cir. 4/28/82); United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 649 (9th Cir. 1980).

The transcript did establish a quorum was present when the Grand Jury deliberated and voted. Nor was the prosecutor required to present to the Grand Jury exculpatory evidence, if any. United States v. Seifert, 648 F.2d 557, 564 (9th Cir. 1980).

The district court erred in excluding Jackson's misdemeanor conviction for making a false statement on a license application (United States v. Field, 652 F.2d 862, 871 (9th Cir. 1980); but the error was harmless in view of defendant's broad impeachment effort which disclosed Jackson's multiple felonies and the substantial remuneration he had received from the Government for his services as an informant. United States v. Bryan, 534 F.2d 205, 206-07 (9th Cir. 1976).

The excluded evidence of Jackson's alleged illegal sale of contraband to state agents was probably not admissible (see United States v. Powell, 587 F.2d 443, 448

(9th Cir. 1978); but in any event the evidence would have had little probative value and its exclusion was harmless.

The court did not abuse its discretion in refusing to replay the video tape to refresh Johnson's recollection. It had just been played, and Johnson had seen and heard it on three earlier occasions. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233 (1940).

Recording the contraband transaction between defendant and government undercover agents on video and audio tape was not a search and seizure. Lopez v. United States, 373 U.S. 427, 438-39 (1963).

The district court did not abuse its discretion in denying defendant's motion for a new trial. The new evidence was collateral, and it cannot be concluded that its admission probably would have produced an acquittal. United States v. Krasny, 607 F.2d 840, 844

(9th Cir. 1979).

The assignment of the case to another judge by the judge who recused himself did not violate equal protection. It would be preferable for a judge to recuse himself completely from all further proceedings after granting a motion under 28 U.S.C. § 144, but defendant has not alleged or demonstrated the replacement judge who tried the case was biased or that defendant was injured in any way. See United States v. Allen, 633 F.2d 1282, 1294 (9th Cir. 1980); United States v. Radlick, 581 F.2d 225, 230 (9th Cir. 1978).

The conviciton is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed
Aug. 20, 1982

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CLYDE MARION MELLIES, Defendant-Appellant.	No. 81-1367 ORDER

Before: BROWNING, Chief Judge, TANG AND FARRIS, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL AND FILING BY MEMBER OF BAR, U.S. SUPREME COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I, ROGER S. HANSON, am a Member of the Bar of the United States Supreme Court, and do hereby certify that I caused on October 19, 1982 to be deposited in the U.S. mail at Ft. Worth, Texas, copies of the foregoing Petition for Certiorari addressed as follows:

40 copies
Clerk, United States Supreme Court
Washington, D.C. 20543

3 Copies
United States Solicitor General
Washington, D.C. 20543

Hon. David W. Williams
U.S. District Court
312 North Spring Street
Los Angeles, California 90012

Office of Clerk
U.S. District Court
312 North Spring Street
Los Angeles, CA 90012

Executed October 19, 1982.

ROGER S. HANSON
Member of Bar
U.S. Supreme Court